USF Red Star, Inc., a U.S. Freightways Company *and* Wayne Zakofsky *and* John M. Hayes

Local 118, International Brotherhood of Teamsters (RMA/Kolko Corporation) *and* John M. Hayes

Local 118, International Brotherhood of Teamsters (USF Red Star, Inc., a U.S. Freightways Company) *and* John M. Hayes. Cases 3–CA–19698, 3–CA–19739, 3–CB–6734, and 3–CB–6894

November 22, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On October 21, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. Respondent USF Red Star, Inc., a U. S. Freightways Company (Red Star) and Respondent Local 118, International Brotherhood of Teamsters (the Union) each filed exceptions with a supporting brief, and the General Counsel filed an answering brief to the Respondents' exceptions. Red Star and the Union each filed a brief in response to the General Counsel's answering brief.

On May 2, 1997, the Board issued an Order remanding the proceeding to the judge for him to make findings of fact, including certain credibility resolutions, and conclusions of law to determine whether, based on the Board's *Wright Line* test,[1] John M. Hayes' and Wayne Zakofsky's discharges were unlawful as alleged in the complaint. On May 30, 1997, the judge issued the attached supplemental decision. Red Star and Teamsters each filed exceptions with a supporting brief, and the General Counsel filed an answering brief to their exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order.

The judge found that the Union violated Section 8(b)(1)(A) and (2) of the Act by its "efficacious demand" that Red Star discharge Hayes from his job as a casual truckdriver because of his internal union activities. He further concluded that Red Star violated Section 8(a)(3) and (1) by discharging Hayes pursuant to the Union's request and violated Section 8(a)(1) by discharging Zakofsky, its Rochester, New York terminal manager, for refusing to follow orders by his superiors that he discharge Hayes in violation of the Act. We adopt the judge's findings of these violations for the reasons stated below.

Facts

The credited evidence shows that Red Star owns and operates a trucking terminal in Rochester where Zakofsky worked as terminal manager for almost 11 years before his discharge on June 21, 1995. The Union represents about 30 drivers and dock employees at the Rochester terminal.

Hayes, who has been a member of the Union since 1977, was employed for many years as a driver for Sexton Foods until that company closed its Rochester operations in 1993. Hayes served as shop steward while employed at Sexton Foods. In December 1988, Hayes was elected the Union's recording secretary when he ran for office on the same slate as Frank Posato who became local president. Hayes won reelection as recording secretary in 1991. In 1993, Posato named Hayes secretary-treasurer on an interim basis to replace Tony Valenti, who had left to take a position with the International Union.[3] Thereafter, John Cantwell defeated Hayes in a special election to determine who would complete Valenti's term as secretary-treasurer.[4] In December 1994, Hayes again ran for secretary-treasurer on a slate that included Valenti, who had returned to the local and was running for president. It is undisputed that the election campaign was hotly contested with both sides criticizing their opponents. The incumbents, Posato and Cantwell, prevailed in the election.

After his defeat in the 1993 special election, Hayes obtained employment as a casual driver for Red Star and worked on an irregular basis until the summer of 1994.[5] Hayes then worked for RMA/Kolko, which also had a collective-bargaining agreement with the Union, until he was laid off in October 1994.[6] In January 1995,[7] shortly after his December 1994 election defeat, Hayes returned to work at Red Star as the only casual driver on its payroll. Hayes told Zakofsky that he thought the Union's leadership was out to blackball him because he had opposed the incumbents in the recent election. Zakofsky

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[2] Red Star and Teamsters have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Although the judge found that Valenti asked Hayes to accept the job, the record shows that it was Posato who appointed Hayes to this position.

[4] Cantwell had been defeated as a candidate for secretary-treasurer in the 1988 and the 1991 elections.

[5] Employers who are signatory to the Union's collective-bargaining agreement employ casuals to replace drivers who are absent due to vacation or illness. Casuals may be fired without regard to the contractual grievance procedure, unless they work 45 days in any 90-calendar day period at which time they attain preferred status and become subject to the grievance provisions.

[6] Hayes filed an unfair labor practice charge alleging that the Union had caused this layoff, but the Region dismissed the charge.

[7] All dates are in 1995, unless otherwise noted.

replied that he would not allow the Union to interfere with terminal operations.

Between January and early March, Zakofsky had several conversations with Cantwell, the Union's secretary-treasurer, in which Cantwell made derogatory remarks about Hayes. Cantwell asked Zakofsky during a grievance meeting held about this time why he was still using that "scumbag," referring to Hayes. Thereafter, Zakofsky received a phone call in early March from Ron Morin, Red Star's director of field services, asking who Hayes was.[8] Morin remarked that Cantwell had said that Hayes was a "troublemaker." Zakofsky replied that Hayes had not caused him any trouble.

There was also evidence that, about this time, employees began speculating that the Union might be seeking to "blackball" Hayes from his driver's job. On one occasion, Red Star driver Larry Palmensano asked the Union's shop steward, Frank Sapienza, what was going on with Hayes while implicitly referring to Hayes' employment status. Sapienza replied that Palmensano should stay out of it because Sapienza "didn't want anything to happen to you."

Also in March, two freight companies closed their Rochester terminals and moved their operations to Buffalo, New York. Zakofsky noted the moves and the resulting jobs lost by the Union's members. He concluded that this would be an opportune time to discuss with the Union the possibility of modifying the start-time provisions in the Union's local agreement with Red Star which had been in existence for many years. These provisions guaranteed drivers a start time between 7 and 8:30 a.m. and required Red Star to pay overtime to any driver who began work before 7 a.m. and to pay any driver who started after 8:30 a.m. as if the driver had started working at 8:30 a.m. The Union previously had rejected any changes in the starting time provisions when Red Star sought them in order to increase its flexibility in the assignment of work.[9]

Zakofsky subsequently raised this subject to Posato and Cantwell during a meeting in mid-March. Posato invited him to prepare a proposal for the Union's consideration. Zakofsky then drafted a proposal that he submitted to Roy Liller, Red Star's vice president, and to Morin in late March or early April. Thereafter, Liller told Zakofsky during a conference call, in which Morin also participated, that his proposal did not go far enough. Liller said that Morin would handle these negotations with the Union and that Morin would threaten to close the Rochester terminal and move its freight operations to Buffalo if the Union did not agree to Red Star's proposals. In early April, after this conference call, Zakofsky received a phone call from Morin who told him that the Union wanted Red Star to stop using Hayes. Zakofsky ignored Morin and continued to use Hayes as a casual driver because Zakofsky considered Liller to be his boss and thought that Morin did not have the authority to give him such an order.

On the morning of April 28, Morin visited the Rochester terminal to discuss with Zakofsky the bid proposal that Red Star would submit to the Union during a meeting that afternoon. That same morning, Hayes had a minor accident when he backed his truck into an overhanging steel beam at a customer's dock. The collision jammed the roll up door on the back of the truck so that it would not open. Before returning to the terminal, Hayes called Zakofsky and told him about the accident. Hayes also reported the accident to Dave Tabor, the dispatcher, when he returned to the terminal. Zakofsky told Tabor to transfer the freight to another truck and to have Hayes fill out an accident report, but to keep the incident quiet. After Red Star's mechanic, Roswell Wood, pried the truck's door open, Hayes loaded the freight onto another truck and completed the deliveries. Wood then repaired the damaged rollup door by cutting a hole in the roof and realigning the rollers. The repair job, which did not require any new parts,[10] took about an hour and cost Red Star $15 at Wood's rate of pay.

During the meeting with the Union on April 28, Red Star's officials presented a new start-time proposal and threatened to close the terminal if the Union did not agree to it. Posato told Morin at the conclusion of the meeting, "Ron, you know what I want. If you want, if you want to negotiate this type of contract, you know what I want." Morin and Posato then met privately for about 5 to 10 minutes. After the meeting, Morin told Zakofsky en route back to the Rochester terminal that "Jack Hayes is gone." When Zakofsky objected to Hayes' dismissal, Morin said that Red Star had no choice and Hayes had to go if Red Star wanted a deal.

Zakofsky issued a written warning to Hayes for his minor accident on April 28 and gave a copy of the warning to the Union's shop steward. Zakofsky testified that he issued a warning because he believed that a minor accident involving minimal damage and cost did not warrant Hayes' discharge. Although the Respondent contends that it has a general unwritten policy to discharge a casual driver who has a preventable accident, Zakofsky credibly testified that terminal managers have discretion in enforcing this policy and that he could overlook minor accidents of the type in which Hayes was involved. Zakofsky took the accident report Hayes had prepared and placed the document in the Rochester terminal's personnel records. Contrary to the Respondent's usual policy, however, he did not enter the accident on Red Star's cor-

[8] Morin was deceased at the time of the hearing in this case.

[9] The record shows that the Union was the only local in the country which retained the benefit of the starting time provision described above.

[10] Because the truck was over 10 years old, Wood did not attempt to restore the vehicle to its original condition.

porate computer. Zakofsky testified that he did not enter the accident because he feared Morin and Liller would seize on the incident as a pretext to terminate Hayes.

After Zakofsky issued Hayes a written warning, Morin called and asked him if he had started "weeding Hayes out." Zakofsky replied that he was not going to do this. Later in May, Liller visited the Rochester terminal and said that Zakofsky had to let Hayes go because of the negotiations with the Union. Zakofsky protested that Hayes' discharge would constitute "illegal racketeering," but Liller insisted that Hayes had to go.

About this time, Zakofsky mentioned Hayes' situation to shop steward Frank Sapienza. After Zakofsky said that he feared he was going to lose his own job over the matter and requested that Sapienza attempt to resolve the problem with Posato and Cantwell, Sapienza said that he did not want to get in the middle of this problem.

The judge found that, following Liller's visit, Zakofsky began using another casual driver even though Hayes was available for work. Morin phoned Zakofsky at the end of May and said that the Union had accepted the deal and that Zakofsky should post the new bids for start times. Liller's diary showing phone calls that he made and received, which was introduced into evidence at the hearing, has the following entry for May 23 regarding a call from Morin.

> Ron Morin—3:33 PM
>
> (a) P&D "sick" Rochester.
>
> (b) Frank Prata. [sic][11]
>
> (c) Bid OK–60 days—10 hr. peddle, shuttles, varied starts.
>
> (d) W. Z. not using as we have asked![12]

Liller admitted in his testimony that he did not learn of Hayes' accident until the following day, May 24, when Morin called to tell him of this incident.[13]

The judge found that Zakofsky changed his mind about "not using" Hayes later in May and again began calling Hayes to work as a casual driver. On June 6, Liller called Zakofsky and asked him why Hayes was working again. Liller insisted that Zakofsky had to get rid of Hayes, who Liller noted was only 4 days short of attaining "preferred status" under the contract with access to the grievance procedure. Later that day, Zakofsky sent Liller a four-page e-mail message in which he refused to discharge Hayes because he believed that the Union was attempting to "blackball" him.

On June 7, Liller again called Zakofsky and reiterated that he had to get rid of Hayes. When Zakofsky objected, Liller said that he had a plane to catch and that Zafofsky had 30 seconds to make up his mind to discharge Hayes or else Liller would discharge Zakofsky. Zakofsky immediately agreed to terminate Hayes. The next day, when Hayes visited the terminal to get his paycheck, Zakofsky said that Red Star was not going to employ him any longer.

On June 9, Liller phoned Zakofsky and asked why he had not entered the accident involving Hayes into Red Star's computer.[14] Zakofsky replied that he had not done this because it was a minor accident involving minimal damage that the mechanic had quickly repaired. Later that day, Zakofsky sent an e-mail to Liller stating his reasons for not entering Hayes' accident into the computer and complaining about Red Star and the Union trading an employee's job for more favorable work rules.

Thereafter, on June 12, Red Star's president, Fred Ratner, called Zakofsky and asked about Hayes' accident. When Zakofsky wanted to discuss the "racketeering that's going on," Ratner said he knew nothing about racketeering and hung up. Liller then went to the Rochester terminal on June 21, and informed Zakofsky that Red Star was terminating him for failing to report Hayes' accident on the computer.

1. Red Star unlawfully discharged Hayes

In adopting the judge's finding that Red Star unlawfully acceded to the Union's demand that it discharge Hayes, we stress that Red Star had a difficult time finding qualified drivers, such as Hayes, who were willing to drive on a casual basis. Thus, Red Star hired Hayes as a casual in 1994 and again in 1995 after RMA/Kolko laid him off. The record shows that Red Star had no problems with Hayes' driving before his minor accident on April 28, described above.

On his return to Red Star's employ in January 1995, Hayes told Zakofsky that he thought that the Union was attempting to blackball him because of his internal union politics. Cantwell, who had defeated Hayes in the union election, later made derogatory remarks to Zakofsky about Hayes' employment with Red Star that tended to confirm Hayes' view of the situation. Indeed, Cantwell directly asked Zakofsky why he was still using that

[11] It appears that Liller was referring to the Union's president, Frank Posato, and incorrectly spelled Posato's last name in his phone log.

[12] The judge found that item (c) of the log entry referred to the starting time agreement with respect to its substantive terms. While acknowledging that Hayes' name did not appear in the May 23 log entry, he found that item (d) referred to the Hayes situation. In this regard, the judge concluded that Liller's May 23 entry in his phone log was consistent with Zakofsky's testimony that Liller and Morin had previously told him to stop using Hayes and that Zakofsky at this point had followed their orders. Thus, after reviewing that phone log entry, the judge found that "it shows that on May 23, Morin called Liller and told him that the Union had accepted the company's proposal regarding the starting times and that as per the previous requests of Liller and Morin, Wayne Zakofsky was not using Hayes anymore.

[13] Liller also testified that he had never heard of Hayes until May 24, but the judge found that this claim "is contradicted by his diary entry of May 23."

[14] Although the judge found that Liller and Zakofsky spoke on June 8, the record shows that this phone conversation actually occurred on June 9.

"scumbag" while referring to Hayes. Morin, the Respondent's management official, later told Zakofsky that Cantwell had described Hayes as a "troublemaker." Morin subsequently informed Zakofsky in early April that the Union wanted Red Star to cease employing Hayes as a casual driver.

We agree with the judge that, when Red Star and the Union met on April 28 to discuss the Union's proposal regarding starting times, Posato implicitly referred to Hayes' discharge (in telling Red Star's officials that they knew what he wanted in return for the Union's acceptance of Red Star's proposals). We note that Red Star has argued that Posato's comment had nothing to do with Hayes' employment status. Red Star relied on Posato's testimony that, while conceding he made this remark, he was referring to his desire to have the Rochester drivers represented by his local haul freight all the way to Buffalo, providing them with additional work. We find that the judge properly rejected this argument because the evidence clearly shows that both Red Star and the Union desired this change and that each side knew it. For this reason, we do not find that the extension of the Rochester drivers' runs from Batavia to Buffalo was any kind of concession on Red Star's part to the Union.

Furthermore, Morin's remark to Zakofsky on April 28, after briefly meeting in private with Posato, that Hayes "was gone" provides additional support for the judge's conclusion that Hayes' discharge was the quid pro quo for the Union's agreement on starting times. We stress that Morin subsequently called Zakofsky and asked if he was "weeding Hayes out." After Zakofsky objected to doing this, Zakofsky's direct superior, Liller, visited the Rochester terminal and told Zakofsky that Hayes had to go because of the negotiations. Although Liller's diary entry for May 23 that "W. Z. not using as we have asked!" may not quite be "a 'smoking gun'" as the judge found, we do conclude from the timing of the events that Liller's written comment, occurring as it did shortly after he visited the Rochester terminal and contemporaneous with Zakofsky's ceasing of Hayes' services, also tends to establish that Red Star wanted to discharge Hayes in order to satisfy the Union.[15] Thus, for the reasons stated here, we find that the General Counsel has established by a preponderance of the evidence that Red Star agreed to the Union's demand that it discharge Hayes, who the Union sought to retaliate against for his internal union activities.

Nor do we find that the Respondent has satisfied its burden of establishing its defense that it would have discharged Hayes because of the accident on April 28 even absent its unlawful motivation. Red Star contends that its policy requires the discharge of casual drivers who have preventable accidents. However, the judge credited testimony that Terminal Manager Zakofsky had discretion to overlook minor accidents involving casual drivers. As explained below, we find that the documentary evidence offered by Red Star also fails to establish that the Respondent's policy *requires* the discharge of a casual driver who has a preventable accident, or that the policy has been so applied.

As noted above, the judge credited Zakofsky's testimony that although the Respondent had a general policy that casual drivers involved in preventable accidents were subject to discharge, Zakofsky and other terminal managers had been given discretion in enforcing the disputed policy, including the authority to overlook minor accidents not involving property damage. The credited testimony included testimony about a specific instance in which Liller expressly condoned Zakofsky's decision to keep using a casual driver who had a preventable accident, telling Zakofsky it was his "call."[16] In addition to this credited testimony, it is undisputed that no casual driver had been discharged for having a preventable accident at the Rochester terminal in the 10 years before the hearing.

With respect to the documentary evidence presented by Red Star in support of its alleged policy, we note first the partial and selective nature of its record search. Liller testified that "we requested our payroll department to go to payroll records of *terminated* personnel files, and pull for us records of casual employees." (Emphasis added.)

[15] Red Star argues that Zakofsky testified that he did not stop using Hayes until after Memorial Day (which was May 29) and therefore the telephone log entry cannot be read as the judge did. The General Counsel responds, however, that, if Zakofsky didn't stop using Hayes until after Memorial Day, the log entry "W Z not using as we have asked!" was a veiled reference to Zakofsky's *refusal* to phase out Hayes. In either event, we agree with the General Counsel that the term "not using" refers to Hayes and belies Liller's contention that the first time he heard of Hayes was on May 24, the day after this phone log entry.

Red Star also argues that the judge's reading of part (d) of the telephone log as referring to Zakofsky's not using Hayes is inconsistent with his alleged finding that on May 24, Liller called Zakofsky to tell him not to use Hayes. It is not clear, however, that the judge, in fact, credited Liller that he had made such a call. However, we note that the judge did find Liller's testimony confirmed by a diary entry on May 24 stating "(c) Talk with Wayne—Hayes accident?" In his supplemental decision, the judge generally found "the testimony of Mr. Liller was not accurate." Also, on May 24, Zakofsky, who generally was credited, did not testify that such a phone call was made. More importantly, it is clear that the judge discredited Liller that May 24 was the first time that he had heard of Hayes in light of the telephone log entry of May 23, which we found referred to Hayes' situation. Moreover, if Liller did make a phone call to Zakofsky on May 24 instructing him not to use Hayes, and if this phone call was triggered by Liller's receiving information about Hayes' accident, the judge nonetheless found that "given the sequence of events, it [is] clear to me that the decision to discharge Hayes was made by Morin and Liller before May 23, 1995; this being a time before they discovered that Hayes had the accident."

[16] Liller was formerly a terminal manager at Newark before he became vice president for terminals. At the time of the hearing, Liller was a consultant to Red Star under a severance agreement. Our dissenting colleague's assertion that the judge implicitly discredited Zakofsky's testimony regarding Liller's remark fails to take into account the judge's discrediting of the Respondent's witnesses to the extent that their testimony conflicted with Zakofsky's.

Liller did not enlist a search of records of "preventable accidents" (the PIVAs, i.e., preventable injury vehicle accidents) and then determine the nature, if any, of the discipline imposed on the casual driver involved. Thus, the very nature of this limited search confirms only that some casual drivers have been discharged for "preventable accidents," a fact that is not in dispute. It does not show that all casual drivers who have had such accidents have been discharged.

Next, we note that even those documents that were entered into evidence are of limited value in establishing the existence of any policy requiring the discharge of casual drivers involved in preventable accidents. Red Star has approximately 32 terminals in the eastern United States and the produced documentary evidence is from only 13 terminals.

Further, of 36 incidents documented by Red Star, 4 involve "probationary" employees.[17] Two of the exhibits consist only of an accident report with no indication of either the driver's employment status or reason for the discharge. Another eight documents give either a reason other than an accident or reasons in addition to an accident for the discharge. One from the Philadelphia terminal indicates that the driver voluntarily resigned. One from Syracuse notes the driver is "no longer available for work." One from the Hartford terminal records the casual driver's discharge as due to the failure to report the accident to the dispatcher, while a letter from the Respondent to the driver cites both the failure to report the accident and the driver's failure to operate the vehicle in a safe manner. One from the Respondent's Boston operation, states "better qualified applicants, preventable accident." Two state only that the driver "does not meet TNT Red Star Express Standards." One simply notes "disqualified," while another states only that the driver has not worked since the accident.

Of the remaining 22 records indicating that the driver was discharged for an accident or a "preventable accident," 1 contains the qualification that the discharged driver was a "new hire." Fifteen of these reports, including one recommending that the driver be rehired, concern accidents involving either damage to a customer's property including fences, signs, guardrails, and equipment, or accidents involving other vehicles. Only seven documents concern discharges resulting from damage to Red Star's equipment, and each of these accident reports detail damage more extensive and costly than the $15 in labor costs to repair Hayes' truck.[18]

We find that this evidence is insufficient to establish that the Respondent had a policy of discharging all casual employees involved in preventable accidents, and that it therefore would have discharged Hayes because of his accident, absent his protected activity.

Accordingly, we find that Red Star's reliance on Hayes' minor accident as the basis for discharging him was pretextual. The real reason, as we have found, was that Red Star had promised the Union that it would discharge Hayes in exchange for the Union's concessions on the drivers' starting time. There is no other explanation for Red Star's reliance on this minor incident as the ground for discharging an otherwise satisfactory employee who worked in a job Red Star had difficulty filling. In reaching this conclusion, we reiterate that Red Star has not shown that Liller and Morin even knew of Hayes' April 28 accident before Morin had agreed on April 28 that the Respondent would discharge Hayes in exchange for the Union's concessions on starting time. Indeed, as the judge found, the evidence shows that Liller and Morin had decided to discharge Hayes and that Zakofsky had briefly stopped "using" Hayes before these management officials learned of Hayes' minor accident on May 24. For these reasons, we reject Red Star's argument that Hayes' accident of April 28 provided an intervening cause that enabled Red Star to discharge Hayes for job misconduct without violating the Act. We therefore conclude that Red Star has violated Section 8(a)(3) and (1) of the Act by effectuating the Union's demand that it terminate Hayes as a casual driver.[19]

2. The Union caused Hayes' discharge

The same factors that we cited in finding that Red Star unlawfully discharged Hayes also support our conclusion that the Union caused this discharge in violation of Section 8(b)(1)(A) and (2). In arguing for a contrary result,

[17] Two of these reports list the employment status as "contract" not "casual," and the written explanation for these discharges is "[p]robationary employee terminated in accordance with Article 3, Section 2 of the National Master Freight Agreement." The third lists the employment status as "regular full time" and the reason for termination as "failing to report an accident." The fourth involves a "[p]robationary employee" discharged for "unsatisfactory work performance."

[18] Our dissenting colleague characterizes 4 of the 36 incidents documented by Red Star as "comparable" to Hayes' accident. We disagree with this characterization. The incident involving Oviatt resulted in damage to his truck as well as to a customer's property, namely; "pulling a guardrail away from its post." The incidents involving Smith and Riley resulted in damage to their vehicles more costly than the damage to Hayes'. Although the incident report involving Link notes that there was no damage to his vehicle, Link describes the accident as "backing into loading dock" while another vehicle tried to pass. Further, the filing of an automobile accident report with the Respondent's insurance carrier suggests that both the driver and the Respondent expected an insurance claim due to property damage resulting from the incident.

[19] Red Star has also argued that the Board should deny Hayes' reinstatement because he did not list two of his previous employers on the job application that he submitted to it. We note, however, that the evidence shows that Hayes specifically mentioned to Zakofsky, Red Star's hiring official, that his application did not include all of his prior employers during their job interview. Thus, it is clear that Zakofsky accepted the application and hired Hayes knowing that his application was missing this information. For this reason, we reject Red Star's argument that Hayes is not entitled to reinstatement.

the Union has stressed that the judge relied extensively on statements made by Morin, Red Star's agent, to support his finding that Hayes' discharge was the quid pro quo for the Union's concessions on starting times. The Union asserted that those adverse statements that Zakofsky attributed to Morin, who was unavailable as a witness due to his death, constituted objectionable hearsay and therefore were inadmissible as evidence against the Union. We reject the Union's argument for the reasons stated below.

Rule 801(d)(2)(E) of the Federal Rules of Evidence permits the admissibility of Morin's statements against the Union if the evidence shows that Morin made them "during the course and furtherance of [a] conspiracy" between Red Star and the Union that resulted in Hayes' discharge. We find that there is sufficient evidence here, independent of the hearsay statements attributed to Morin, of the Union's animus towards Hayes to warrant treating the Union as a co-conspirator in pursuing this unlawful objective. In so concluding, we rely on the derogatory remarks about Hayes that Cantwell made to Zakofsky in early 1995, and in particular Cantwell's inquiry concerning why Zafofsky was still using that "scumbag." We also stress the comments that Posato made to Zakofsky and Morin at the end of the bargaining session on April 28, when he told them that "you know what I want" in return for the Union's concessions on starting times. We have concluded above that the most logical inference emanating from Posato's statement is that the Union wanted Red Star to discharge Hayes as a concession for relinquishing the longstanding restriction on starting times. We therefore find that the conduct of Union Agents Cantwell and Posato tends to establish by a preponderance of the evidence that there was a conspiracy between the Union and Red Star to terminate Hayes' employment.

Based on this evidence implicating the Union as a co-conspirator in Hayes' unlawful discharge, we find that Morin's statements to Zakofsky "in furtherance of the conspiracy" are attributable to the Union as a participant in this unlawful scheme under Rule 801(d)(2)((E). Thus, the Union, as well as Red Star, bears responsibility for Morin's conduct as he sought to arrange Hayes' dismissal in order to satisfy the Union's bargaining demand. We therefore adopt the judge's finding that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing or attempting to cause Red Star to discharge Hayes.

3. Red Star violated Section 8(a)(1) by discharging Zakofsky

In adopting the judge's finding that Red Star unlawfully terminated Zakofsky, we stress that Red Star had employed Zakofsky as the Rochester terminal manager for 11 years and that, as the judge found, there was no showing that he was anything but competent while working in this capacity. Further, as stated, the evidence shows that Red Star informed Zakofsky that he should use his own discretion in managing terminal operations. We have concluded that Zakofsky thought that he was acting pursuant to the discretion that Red Star had afforded him when he did not discharge Hayes after Hayes had a preventable accident that involved a mere $15 in damages. Zakofsky's action also was consistent with the comments made to him by the Buffalo and Syracuse terminal managers that, in some instances, they would not overlook minor accidents caused by casual drivers because of the difficulty in replacing them. We also note that, as Zakofsky testified, this minor accident was exactly the kind of event that, if Liller and Morin had known about it, they would have utilized as a pretext to terminate Hayes while fulfilling Red Star's agreement with the Union.[20]

For these reasons, we conclude that Red Star has failed to demonstrate that Zakofsky engaged in any misconduct that would have caused Red Star to discharge him for legitimate reasons. Thus, we agree with the judge that Red Star seized on Zakofsky's failure to report the accident to mask the actual reason for Zakofsky's discharge which was his refusal to participate in the unlawful scheme with the Union to get rid of Hayes. In reaching this conclusion, we rely on the evidence that Zakofsky's discharge occurred less than 2 weeks after Red Star had acceded to Hayes' termination in violation of Section 8(a)(3). We also stress that, given Red Star's failure to assert at the time of Zakofsky's discharge that his performance as terminal manager was deficient in any other respect, there can be no other reason that Red Star would suddenly discharge a competent manager with 11 years' tenure.[21]

Accordingly, we conclude that Red Star violated Section 8(a)(1) of the Act by discharging Zakofsky because he refused to participate in its unlawful conspiracy with the Union to effectuate Hayes' discharge. We find that Zakofsky's discharge in these circumstances was unlawful.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 3 and renumber the subsequent Conclusion of Law.

"3. By discharging its terminal manager, Wayne Zakofsky, because he refused to follow orders requiring him to discharge Hayes in violation of the Act, the Respondent has violated Section 8(a)(1) of the Act."

[20] While Zakofsky failed to report the accident, that failure, as explained by the judge "was motivated by his refusal to be a part of the illegal trade worked out between the Union and Morin for a start time agreement in exchange for Hayes' job," and therefore was inextricably tied to his justifiable belief that it would be used as a pretext to fire Hayes.

[21] Although Red Star has contended that, in any event, Zakofsky is ineligible for reinstatement because he was derelect in his duties by failing to report the accident, we find no merit to this position for the same reasons stated above.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, USF Red Star, Inc., a U.S. Freightways Company, Rochester, New York, its officers, agents, successors, and assigns, and Local 118, International Brotherhood of Teamsters, Rochester, New York, its officers, agents, and representatives, shall take the action set forth in the recommended Order.

MEMBER BRAME, dissenting.

Contrary to my colleagues, I would reverse the judge and find that Respondent USF Red Star, a U.S. Freightways Company (Red Star) has shown that it would have discharged John M. Hayes even in the absence of his internal union activities. Based on the evidence that Hayes was a casual truckdriver who had a preventable accident, I would find that Red Star lawfully terminated Hayes, as fully discussed below, pursuant to its well-established company rule that requires the discharge of any casual driver causing such an accident. The judge's further findings that Respondent Teamsters (the Union) violated Section 8(b)(1)(A) and (2) of the Act by its "efficacious demand" for Hayes' discharge and that Red Star violated Section 8(a)(1) of the Act by discharging Terminal Manager Wayne Zakofsky because he refused to participate in the alleged unlawful scheme to effectuate Hayes' termination are dependent on whether Red Star unlawfully discharged Hayes and, as I would dismiss that allegation, I also disagree with the majority's and the judge's findings of these additional violations.

The evidence shows that Red Star, a trucking company, rehired Hayes to work as a casual driver at its Rochester, New York terminal in January 1995.[1] Before Hayes returned to Red Star, he was defeated as a candidate for secretary-treasurer of the Union by the incumbent, John Cantwell, in a hotly contested election. The General Counsel presented evidence suggesting that Cantwell, in particular, and also the Union's president, Frank Posato, were resentful that Hayes had run for office opposite their slate of candidates.

In March 1995,[2] two trucking companies closed their Rochester terminals resulting in jobs lost by the Union's members. Terminal Manager Zakofsky and Ron Morin, Red Star's director of field services, decided that in light of this situation they would explore the possibility of modifying the guaranteed starting time provisions for drivers in the collective-bargaining agreement, which had been in existence for years and which had greatly hindered Red Star's ability to assign work on a cost-effective basis.[3] When Red Star raised this issue to the Union, Posato invited Red Star to submit a bid for the Union's consideration. Red Star's officials prepared a bid proposal and scheduled a meeting with the Union, on April 28, to discuss their proposal.

On the morning of April 28, Hayes had an accident when he backed his truck into an overhanging steel beam at a customer's dock causing the rollup door on the back of the truck to jam. Hayes immediately called Zakofsky and reported the accident to him. When Hayes returned to Red Star's terminal, a mechanic pried open the truck door and Hayes loaded the remaining freight onto another truck to complete the deliveries. Zakofsky later issued Hayes a written warning for the accident and gave a copy of it to the shop steward. Although Zakofsky placed a copy of the accident report that Hayes had prepared in Hayes' personnel record, in contravention of the usual practice, he did not enter the accident on Red Star's corporate computer.

During the meeting on April 28, Morin and Zakofsky presented a new proposal on starting times and threatened to close the Rochester terminal if the Union did not agree to it. The evidence may suggest that the Union was willing to accept Red Star's proposal if Red Star terminated Hayes as a casual driver. It also appears that Morin, who was deceased at the time of the hearing, was willing to approve Hayes' dismissal as the quid pro quo for the Union's concessions on starting times. Zakofsky testified at the hearing, however, that he objected to the proposed agreement because he thought that Red Star's discharge of Hayes in these circumstances would constitute illegal racketeering.

In May, Morin phoned Zakofsky and asked whether he had started "weeding Hayes out." Red Star's vice president, Roy Liller, visited the Rochester terminal later in May and instructed Zakofsky that he had to terminate Hayes because of the union negotiations. On both occasions, Zakofsky protested the orders directing him to dismiss Hayes. Nonetheless, following Liller's visit, Zakofsky began using another casual driver even though Hayes was available for work.

Some time thereafter, however, Zakofsky again assigned Hayes work as a casual driver. On May 24, Morin phoned Liller and informed him of Hayes' accident that Zakofsky had not reported. I am satisfied that the judge found that on that day Liller called Zakofsky and told him not to use Hayes.[4] Red Star has a company rule requiring that terminal managers automatically discharge any casual driver who has a preventable accident.

[1] Hayes also had worked for Red Star as a casual driver the previous year. Pursuant to Red Star's collective-bargaining agreement with the Union, Red Star can employ casuals to replace drivers, who are absent due to vacation or illness, and may discharge casual drivers without regard to the contractual grievance procedure, unless they work 45 days in any 90-calendar day period at which time their discipline becomes subject to the grievance provisions.

[2] All dates are in 1995, unless otherwise noted.

[3] These provisions guaranteed drivers a start time between 7 and 8:30 a.m. and required Red Star to pay overtime to any driver who began work before 7 a.m. and to pay any driver who started after 8:30 a.m. as if the driver had started working at 8:30 a.m.

[4] The judge found that Liller's testimony on this point was "confirmed" by an entry in his diary for May 24.

Red Star also presented evidence at the hearing showing over 30 instances in which it had discharged casual drivers because they had preventable accidents. Thereafter, on June 6, Liller called Zakofsky and insisted that he had to get rid of Hayes. After another conversation on June 7 in which Liller threatened Zakofsky with discharge if he failed to follow orders on Hayes, Zakofsky told Hayes the following day that Red Star was discharging him. Red Star later terminated Zakofsky on June 21, because he violated company policy by failing to report Hayes' accident on Red Star's computer.

Assuming arguendo there is evidence here suggesting that Red Star and the Union had agreed to an unlawful scheme that would have caused Hayes' discharge, I would find that the accident Hayes had on April 28 was an intervening occurrence that provided Red Star with a lawful reason to discharge him. Here, there is no dispute that Hayes had a preventable accident when he backed into the customer's dock that day. It is also clear that Red Star, as the majority and the judge have conceded, has an established policy requiring the discharge of any casual driver who has a preventable accident. Thus, Hayes' preventable accident provided Red Star with a lawful reason to discharge him notwithstanding any evidence that Red Star was in the process of "weeding [him] out" for reasons violative of the Act.[5] My colleagues' and the judge's reliance on evidence that Red Star may have decided to discharge him before learning of the accident is misplaced in this case where, through his own negligence, Hayes had a preventable discharge that would have caused his discharge in any event.[6]

Furthermore, as stated, Red Star introduced into evidence at the hearing over 30 accident reports of preventable accidents involving casual drivers, along with change of employment status reports showing that these preventable accidents had resulted in the causal driver's termination in every case. Despite this overwhelming evidence demonstrating the consistency of Red Star's practice with respect to casual drivers, the judge found that Red Star had failed to establish "whether *every* casual driver having a preventable accident was invariably discharged." The judge, in effect, required Red Star to prove the negative.[7] Red Star, however, satisfied its burden by introducing evidence of its inflexible rule and 30 instances of consistent enforcement. The General Counsel introduced no specific evidence that Red Star ever ignored, forgave, or declined to act on any preventable accident by a casual driver.[8] Indeed, the Board has found that an employer has acted consistently with its past practice in discharging an employee based on much less supporting evidence than exists here.[9] In short, Red Star's evidence fully supported the negative proposition that it allowed no exceptions to its general policy of discharging every casual driver who has a preventable accident. The General Counsel had the opportunity to present evidence of exceptions but failed to provide it. Although my colleagues conclude that Red Star's defense

[5] In passing, I note that my colleagues and the judge interpret Liller's diary entry of May 23 as establishing that the Respondent had stopped using Hayes as a casual driver before Liller and Morin learned of Hayes' accident the following day. I have some misgivings about this finding based on the factual controversy in the record as to the exact date that the Respondent ceased employing Hayes. Thus, Zakofsky himself testified that he stopping giving Hayes any work assignments "right after Memorial Day," which was May 29 that year. I also note that the General Counsel, in his reply brief to the Respondent's original exceptions, suggested a different interpretation of the May 23 diary entry by asserting that Liller's comment that "W. Z. not using as we have asked!" was a veiled reference to Zakofsky's *refusal* to phase out Hayes. For these reasons, although it is not critical to my decision in this case, I do not find that this record neatly establishes the timeline that it necessary for the finding of a violation under the majority's and the judge's view of the case.

[6] See *Mission Valley Ford Truck Sales,* 295 NLRB 889, 892–895 (1989), in which the Board adopted the judge's finding that the employer lawfully discharged a mechanic for failing to perform assigned work 1 day after the employer threatened him with discharge because of his union activities.

[7] In finding that the Respondent had not met its burden here, the judge engaged in what one might call the "fallacy of fairness," a practice whereby those who both decide a case and also establish the evidentiary burden that a party must satisfy to win, first satisfies the requirement of fairness by fixing an evidentiary burden, which just happens to exceed a party's ability to satisfy it from the record, and then "impartially" finds that the party must lose because of its failure to meet this burden. This fallacy is akin to what Thomas Sowell has called the "precisional fallacy": "the practice of asserting the necessity of a degree of precision exceeding that required for deciding the issue at hand. Ultimately there is no degree of precision—in words or numbers—that cannot be considered inadequate by simply demanding a *higher* degree of precision." Thomas Sowell, *Knowledge and Decisions,* 291 (HarperCollins, 1980, 1996) (emphasis in original).

[8] My colleagues claim that the "credited testimony included testimony" that, in one instance, Liller allowed Zakofsky to decide whether to retain an unnamed casual driver who had a preventable accident. Although the judge credited significant aspects of Zakofsky's testimony, I note that, contrary to the majority's intimation, the judge did not credit Zakofsky's testimony regarding this alleged incident. Indeed, the judge failed to discuss this evidence that my colleagues rely on in either of his decisions here. Nor can my colleagues claim that the judge credited Zakofsky on all his testimony. For example, Zakofsky initially testified that he had discretion not only not to discharge casuals with preventable accidents but also not to report such accidents. He later recanted such testimony and the judge found he had no discretion to fail to report accidents. I further note that the judge specifically found that "this type of situation has not arisen" at either the Respondent's Rochester or Buffalo terminals for the past 10 years. For all these reasons, including Zakofsky's failure to provide any specific information regarding the casual driver he purportedly did not terminate, I find that the judge either implicitly discredited Zakofsky's testimony on this point or the incident Zakofsky was referring to happened so long ago that it is no longer relevant here.

[9] *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (employer justified discharge by demonstrating that it had discharged one other employee for theft even though the circumstances were not "on all fours" with the situation there). See also *West Covina Disposal,* 315 NLRB 47, 63–64 (1994) (no unfair labor practice found in Carrillo's discharge where the employer had discharged one other employee who had an "at-fault" accident during the same time period*); Norbar,* 267 NLRB 916, 918 (1983), modified on other grounds 752 F.2d 235 (6th Cir. 1985) (employer lawfully discharged driver Tucker based on evidence showing that it had discharged four other drivers for similar accidents).

was pretextual based on Zakofsky's vague testimony that he and two other terminal managers may have ignored accidents by casual drivers because of the difficulty they had in finding qualified casual drivers, I stress that Zakofsky did not provide even one specific example of an instance in which they purportedly made exceptions to Red Star's general policy. I also find it immaterial that Hayes' preventable accident resulted in only minor damage to the vehicle absent evidence that Red Star's policy differentiates among accidents according to the gravity of such accidents.[10] Therefore, contrary to the judge and my colleagues, I would find that Red Star has shown that the asserted reason for Hayes' discharge was not pretextual based on the evidence that it has a uniform practice of discharging casual drivers who have preventable accidents.[11]

For these reasons, I would find that, although the General Counsel may have presented a prima facie case that Red Star unlawfully discharged Hayes, Red Star demonstrated that it has consistently discharged other casual drivers who have preventable accidents and that its discharge of Hayes was consistent was that practice. Accordingly, I would conclude that Red Star satisfied its burden under *Wright Line* in this case when it established by a preponderance of the evidence that it would have discharged Hayes even in the absence of his union activities. Because as litigated by the General Counsel the remaining allegations involving Hayes and former Terminal Manager Zakofsky are, as stated, dependent on the lawfulness of Red Star's termination of Hayes, I would dismiss the complaint in its entirety.

[10] Although my colleagues try to blur this issue by scrutinizing the Respondent's records of these accidents and raising concerns that even the General Counsel did not raise (and thus denying the Respondent the opportunity to respond), my own examination of the records discloses that a number of these accidents were no different in degree and kind than Hayes' incident, particularly considering the size of the vehicles involved. For example, the Respondent discharged casual driver James Riley for striking the truck's left front bumper on a store retaining wall and scratching the bumper-fender light. In another instance, the Respondent terminated casual driver Donald Link for a preventable accident that apparently caused no damage to Link's truck or anyone else's property. While Link's employee data change authorization form indicates that he "[d]oes not meet company requirements [accident]", it seems to me that the Respondent was simply explaining that Link had been discharged for violating its policy regarding casual drivers who have preventable accidents. In another case involving a casual driver, the Respondent discharged George Oviatt after he "scrape[d]" the tires of his truck on a snowy day in a "[d]elivery area that had not been plowed" causing minor damage to the customer's guardrail. Finally, the Respondent discharged casual driver Alfred Smith, with a notation on the accident report identical to that Link received on his, because his truck incurred damage to the right door and mirror, even though Smith claimed on the accident report that he was not driving the vehicle when the accident occurred. In short, Hayes' accident was comparable to those of Riley, Link, Oviatt, and Smith, which also had warranted discharge under the Respondent's policy on such incidents.

[11] See *Transcon Lines*, 259 NLRB 1424 (1982), in which the Board similarly found that the employer had shown that it uniformly followed its practice of discharging casual drivers who have preventable accidents; and *Synergy Gas Corp. v. NLRB,* 19 F.3d 649, 653 (D.C. Cir. 1994), modifying in relevant part 309 NLRB 179 (1992) (employer consistently followed its practice of discharging drivers involved in serious accidents).

Doren Goldstone, Esq., for the General Counsel.
Paul M. Sansoucy, Esq. and *Subhash Viswantathan, Esq*., for the Respondent Employer.
Michael T. Harren Esq., for the Respondent Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Rochester, New York, on July 8–11, 1996. The following charges were filed against the Respondent, USF Red Star, Inc., a U.S. Freightways Company,[1] in Case 3–CA–19698 was filed by Zakofsky on October 20, 1995, and an amended charge was filed by him on November 6, 1995. The charge in Case 3–CB–6734 was filed by Hayes on January 17, 1995. The charges in Cases 3–CA–19739 and 3–CB–6894 were filed by Hayes on November 20, 1995.

On April 30, 1996, the Acting Director for Region 3 of the National Labor Relations Board (the Board) issued an amended consolidated complaint alleging as follows:

1. That in or about, September 1994, the Union by a junior shop steward, promised John Hayes a good job with benefits, if he would withdraw his candidacy for a union office.

2. That from March 1995 until June 8, 1995, the Union had repeatedly requested that Red Star discharge Hayes.

3. That the reason the Union requested the discharge of Hayes was because of his protected intraunion activities and for reasons other than his failure to tender uniformly required initiation fees and periodic dues.

4. That on June 8, 1995, the Respondent, Red Star, acceded to the Union's request and discharged its employee Hayes.

5. That on or about June 21, 1995, Red Star discharged its Terminal Manager Wayne Zakofsky because he refused to commit an unfair labor practice, to wit: refusing to discharge Hayes in a manner that would conceal the Company's unlawful motive.

6. That by requesting and obtaining the discharge of Hayes the Union violated Section 8(b)(1)(A) and (2) of the Act.

7. That by acceding to the Union's request for the discharge of Hayes, the Company violated Section 8(a)(1) and (3) of the Act.

8. That by discharging Supervisor Zakofsky because he refused to participate in or coverup an unfair labor practice, the Company has violated Section 8(a)(1) of the Act.

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Although the original caption of the case indicated that the Employer's names was TNT Red Star Express, Inc., the correct name of the Company is USF Red Star Inc., a U.S. Freightways Company.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the freight business and operates about 32 trucking terminals in the eastern United States. Each terminal has a manager who is in charge of its operations and supervises various categories of employees including, drivers, dockmen, mechanics, clerical employees, sales people, and other nonmanagerial employees. In Rochester, the terminal was managed by Wayne Zakofsky who had been employed in that capacity for 11 years. At this terminal, there were about 30 drivers and dockmen, plus, 3 clericals and 1 mechanic. John M. Hayes, at two separate times, was employed as a casual truckdriver at the Rochester terminal.

The Company is party to the National Master Freight Agreement with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America and the employees at the Rochester terminal are represented by Teamsters, Local 118. At appendix B of the agreement (G.C.Exh. 4 at p. 226), there is a local arrangement covering starting times between the Company and Local 118 which affects the Rochester operation. Without going into details at this point, it is noted that this provision becomes important later in this story.

Hayes has been a member of Local 118 since 1977 and was employed by a company called Sexton Food until it closed its Rochester operations in 1993. In February 1994, Hayes obtained employment as a casual driver for Red Star and worked on an irregular basis until the summer of 1994 when he obtained employment at another local company called RMA/Kolko which also had a contract with Local 118. Hayes was laid off at Kolko in October 1994. After this layoff, Hayes complained to the NLRB's Regional Office that the Union had caused his termination and this allegation was dismissed by the Regional Director who stated, inter alia:

> [T]he investigation revealed that you were hired as a temporary driver under the terms of the collective-bargaining agreement between the Employer and Local 118. At the end of the Employer's busy season when drivers returned from vacations and disability leaves, your temporary employment was terminated. At the time of your termination, the employer also terminated another seasonal employee for the same reasons.

In January 1995, Hayes returned to work at Red Star as a casual drive.[2] Both Hayes and Zakofsky testified that Hayes told Zakofsky that he believed that the Union's leadership was out to blackball Hayes because he had recently run for union office. Zakofsky assured him that he would not be pressured by the Union. Hayes worked at Red Star until June 8, 1995, when he was fired. As noted above, the General Counsel contends that Hayes was discharged as a result of the Union's demands for his discharge and that Zakofsky was, thereafter, discharged because he opposed the Company's decision to discharge Hayes. The Respondents contend that Hayes was discharged because he got into a preventable accident while on duty and that Zakofsky was discharged because he failed to report Hayes' accident as required by company policy.

At this point, it is necessary to backtrack to discuss the relationship between Hayes and Local 118.

While employed at Sexton, Hayes had been a union shop steward. In December 1988, Hayes ran for the position of recording secretary on the same slate as Frank Posato who ran for president. Both were elected. Hayes was reelected to this position in 1991. In 1993, the Union's secretary-treasurer, Tony Valenti, left to take a position with the International Union and Valenti asked Hayes to take his place until a new election could be conducted. In the spring of 1993, Hayes lost a special election to John Cantwell who became the Union's secretary-treasurer. (In the 1988 elections, Cantwell had run and lost for the position of secretary-treasurer on a slate opposed to Posato and Hayes. In 1991, Cantwell had lost to Valenti for this same position.)

Another round of elections were scheduled for December 1994 and in September, Hayes started to campaign for the position of secretary-treasurer on a slate that included Valenti who had returned to the local union and was running for the position of president. According to the testimony of Posato, this election campaign was vigorous and both sides were throwing dirt. He described the campaign as hotly contested and more so than in the past. In any event, the elections were held in December 1994 and Posato and Cantwell retained their positions, while Hayes and Valenti were defeated.

Hayes testified that in September 1994, a junior union shop steward, Michael Villarealle, spoke to him and said that if he would back out of the election, Cantwell would see that Hayes would get a full-time job with benefits. Villarealle denied this statement. He did however testify that during a conversation he had with Hayes, he expressed his disgust at the negative tone of the election campaign and urged Hayes not to tear down his opponent. Thus, without making any conclusion as to who was slinging the most mud, Villarealle's version of this conversation confirms that the election campaign was heated and could easily have aroused personnel hostilities among the campaigners.

As noted above, Hayes obtained the job at Red Star in January 1995 and obtained Zakofsky's assurance that he would not accede to any attempts by the Union to blackball him. It is noted that Hayes and Zakofsky are not related and did not have any social connections apart from their employment at Red Star.

Zakofsky testified that on several occasions during January, February, and early March 1995, Cantwell made adverse remarks about Hayes and asked if he was still employed by the Company. Zakofsky testified that he responded that Hayes was doing his job and that he did not want to get involved in union politics. Cantwell denies making the disparaging statements about Hayes and denies asking Zakofsky to discharge him.

At about this time, there was talk amongst the shop employees and speculation that the Union might be out to blackball Hayes. For example, John Backman, the salesman, testified that on a couple of occasions, Wayne Zakofsky told him that there seemed to be blackballing going on with respect to Hayes and that Zakofsky did not want to be a part of it. Also, company driver, Larry Palmensano, testified that when he asked Shop Steward Frank Sapienza what was going on with Hayes (everyone thinking that he was being blackballed); Sapienza

[2] Pursuant to the terms of the collective-bargaining agreement (at p. 150), a casual employee is one who may be used by the Employer to cover jobs caused by vacation, sickness, absenteeism, etc. A person employed as a casual may be terminated without recourse to the grievance procedure. If a casual employee works 45 days in any 90-calendar day period, his status is changed to someone with preferred status and becomes subject to the grievance/arbitration procedures of the contract.

said that he should stay out of it; that he "didn't want to see anything happen to you.''

According to Zakofsky, in early March 1995, he received a phone call from Ron Morin, the Company's director of field services who asked who Hayes was. Zakofsky testified that Morin further stated that he had spoken to Cantwell who said that Hayes was a troublemaker. Zakofsky states that he told Morin that he had no trouble with Hayes. As Morin is deceased, neither the Company nor the Union could rebut this testimony. For purposes of this decision, I will assume that Morin would have denied it. Although Roy Liller, then the vice president, testified that he believed that Zakofsky's allegation that the Union was seeking Hayes' discharge was made up of whole cloth, Backman testified that Zakofsky told him that Hayes' discharge was being made a quid pro quo for something else and that Ron Morin had told him not to use Hayes anymore.

In March 1995, two other unionized companies moved their freight terminals from Rochester to Buffalo. Zakofsky, noting the loss of union jobs in the area, surmised that this might be an opportune time to press the Union to make some concessions in the contract; specifically the provisions governing start times, which were peculiar to those companies having contracts with Local 118. In this regard, the contract guaranteed employees represented by this Local, a start time between 7 and 8:30 a.m. and required the Company to pay overtime rates to anyone who was scheduled to begin work before 7 a.m., irrespective of how many hours that person worked during that day. Moreover, if the Employer wanted to schedule an employee to start after 8:30 a.m., it could do so, but would be required to pay the employee as if he began at 8:30 a.m. Needless to say, the Company viewed the start-time provisions as being a hindrance to its ability to have flexibility in the assignment of employees. This was becoming increasingly important because of the competition from other companies who were offering next day delivery, which could not be matched unless the Company had more flexibility in making assignments.

Zakofsky testified that he met with Cantwell and Union President Frank Posato in early March 1995 and told them that he wanted to talk about modifying the start time provisions of the contract. He states that Posato said that if Zakofsky prepared a proposal, he would consider it. In a letter dated March 16, 1995, Zakofsky wrote to Posato as follows:

> It was a pleasure meeting with you recently concerning the future growth of TNT Red Star and the cooperation which is needed by both Union and Management to ensure our success.
>
> Frank, as I explained, the overnight service is a must for TNT Red Star to be competitive in our market place. We can no longer operate the same today as we did over the years. The industry has changed and is changing every day.
>
> Your willingness to listen, and talk to the men about some of the issues is appreciated. As we agreed, I will come up with a tentative plan, and hopefully we can work together to improve TNT Red Star's future success in Rochester.

According to Zakofsky, after his meeting with the Union, he spoke to Roy Liller, the Company's vice president in late March or early April 1995. Zakofsky states that he obtained authorization to draft a proposal. This he did and sent copies to Liller and Ron Morin. After reviewing the draft, Liller told Zakofsky during a conference call also participated in by Morin, that his proposal did not go far enough and that the Company was going to "go the full 9 yards.'' Liller further told Zakofsky that Morin was going to handle the negotiations with the Union and that Morin was going to make it plain to the Union that unless they agreed to the Company's proposals, the Rochester freight operations would be closed and moved to Buffalo.

In this regard, Liller testified that although he would have prepared to keep the Rochester facility open to take care of local customers, he was prepared to close it if the Union did not give substantial concessions on the start-time issue as these changes were needed to coordinate Rochester's nonlocal deliveries with the other terminals of the Company. As a consequence of these discussions, Zakofsky sent a letter to Posato on April 6, 1995, wherein he stated that there would be a delay in forwarding the Company's proposals.

Zakofsky testified that at some point after the conference call and before he sent the April 6 letter, he received a phone call from Morin who said that the Union wanted the Company to stop using Hayes. According to Zakofsky, he ignored this remark and continued to use Hayes as a casual employee when needed. He states that he considered Liller to be his boss and, therefore, felt that Morin had no authority to give him an order to cease using Hayes.

April 28 1995 was quite a day for the participants in this case.

On the morning of April 28, Morin came to the terminal to go over with Zakofsky the bid proposal that they were going to present to the Union that afternoon. Morin brought with him various documentary materials to use to bolster the Company's argument. Before leaving for the meeting, Morin telephoned Liller to review the Company's goals.

Also on the morning of April 28, Hayes reported at his normal time and took out a truck on a delivery run. Noting that Morin was at the terminal, Hayes testified that he was a "nervous wreck." In any event, Hayes backed his truck into an overhanging beam at a customers loading dock and this resulted in the rollup door on the back of the truck being jammed. Before returning to the terminal, Hayes called and spoke to Zakofsky about the accident. When Hayes returned to the terminal, he reported the accident to dispatcher Dave Tabor. Zakofsky told Tabor to transfer the freight to another truck, and to have Hayes fill out an accident report but to keep the accident quiet. (At the time, Morin was physically at the terminal.) The back door was opened by using a motor and a pry bar but it would not close. Hayes filled out the accident report and Tabor put it on Zakofsky's desk. Hayes then took another truck to complete his deliveries. Thereafter, the door was "fixed'' by mechanic Roswell Wood who cut a hole in the roof and realigned the rollers on which the door slid up and down. This took very little time and at Wood's rate of pay, cost about $15. As the truck was over 10 years old and was otherwise banged up, no further repairs were attempted on the truck and it was put back in service.

Zakofsky decided not to discharge Hayes but to give him a warning for this accident, which he viewed as being a preventable accident. Zakofsky did not forward the accident report as he was required to do and his reason for this was that he believed that if he did, his superiors, Liller and Morin, would use this as a pretext to discharge Hayes.

On the afternoon of April 28, Morin and Zakofsky met with Union Representatives, Posato and Cantwell. At the outset of the meeting, when the Company presented its proposal and threatened to close the terminal, Posato took a tough posture and responded that for all he cared, the Company could move to Buffalo. Cantwell intervened and said that he was interested in saving jobs; this leading to more fruitful discussions. Zakofsky testified that at the conclusion of the meeting, Posato said, "Ron, you know what I want; if you want to negotiate this type of contract, you know what I want." According to Zakofsky, Morin and Posato then met privately. He states that when he and Morin were returning to the terminal, Morin said, "Jack Hayes is gone." Zakofsky states that when he objected, Morin said that they had no choice and that if the Company wanted a deal, Hayes had to go.

Frank Posato concedes that he did say to Morin, "[Y]ou know what I want.'' But, he explains that this remark was not in any way associated with Hayes but rather was intended to convey his message, that in consideration for the Company's proposed new starting time bids, he wanted the Rochester drivers to be able to take loads all the way to Buffalo instead of the current practice of dropping them off in Batavia and having the loads picked up by Buffalo drivers. According to Posato, there ultimately was an agreement on start times but that he was not involved in that decision which was made by Cantwell.

Cantwell's testimony corroborated Posato to the extent that he also indicated that the quid pro quo sought for the Company's proposal was having the Rochester drivers being able to deliver loads all the way to Buffalo. However, he testified that the ultimate agreement was made not by him, but by Posato.

With respect to asserted the quid pro quo, the testimony of Liller, Posato, and Cantwell makes it abundantly clear that the Company, as much as the Union, was desirous of having the Rochester drivers be able bring their loads to Buffalo instead of dropping them off at Batavia. This was not viewed by the Company as a concession on its part but rather as an additional benefit. In fact, the only potential obstacle to this arrangement was the Union's sister local in Buffalo that might object. Thus, the Union's alleged quid pro quo was not a concession that was obtainable from the Company, but was one that had to be obtained from the Buffalo local of the Teamsters union. As such, it makes little sense for me to conclude that the Union was willing to agree to a change in the start times only if the Company was willing to agree to something that was not within the Company's power to offer.

If the asserted quid pro quo was not what the Union claims, then if there was one, what was it?

On May 4, 1995, Zakofsky issued a written warning to Hayes. He states that he decided to issue a warning because he felt that the accident did not warrant his discharge. Zakofsky testified that he believed that as terminal manager, he had discretion in this matter. Zakofsky gave a copy of the warning to Shop Steward Sapienza and placed the accident report in the terminal's personnel files. Zakofsky did not, however, log the accident in the Company's computer system and this was concededly a breach of company policy. No doubt, Zakofsky intended to hide the accident from his superiors, Liller and Morin, because he suspected that if they found out about the accident, they would have a good excuse to discharge Hayes.[3]

Zakofsky testified that after the May 4 warning, Morin called him and asked if he had started "weeding Hayes out." Zakofsky states that he told Morin that he disagreed with the Morin's position on Hayes and that he was not going to follow these orders.

According to Zakofsky, Liller visited the Rochester terminal in May and told him that because of the negotiations, Hayes had to be let go. Zakofsky testified that he protested that this would be illegal racketeering, but that Liller insisted that Hayes had to go. This conversation is denied by Liller who also denied making a trip to Rochester at this time. In any event, Zakofsky testified that after this conversation with Liller, he caved in and began using another casual driver at times when Hayes was available. He testified that he spoke to the dispatchers and told them not to use Hayes because Hayes was being blackballed by the Union. Dispatcher Taber testified, however, that Zakofsky never told him that Hayes was being blackballed.

Zakofsky also testified that in May, he spoke to Shop Steward Sapienza and after telling him that he was probably going to lose his job, asked Sapienza to talk to Posato and Cantwell and call them off. Sapienza, according to Zakofsky, said that he did not want to get in the middle of this. In this regard, Sapienza essentially corroborated Zakofsky's testimony, stating that Zakofsky told him that he should talk to the Union about the blackballing claim and that he responded that he did not want to because it would be embarrassing.

Zakofsky testified that at the end of May, he received a call from Morin who told him that the Union had accepted the deal and that he should post the new bids. In this respect, Liller's diary has the following entry for May 23, 1995 at item 15:

> Ron Morin—3:33 p.m.
> (a) P&D "sick" Rochester.
> (b) Frank Prata.
> (c) Bid OK—60 days—10 hr. peddle, shuttles, varied starts.
> (d) W. Z. not using as we have asked![4]

Item (c) of the entry refers to the starting time agreement with respect to its substantive terms. Although Liller testified that item (d) meant that Wayne Zakofsky was supposed to monitor the agreement, such a meaning is not consistent with the words used. Rather, it is my opinion that the language "W. Z. not using as we have asked'' is consistent with the testimony of Zakofsky that he had previously been told by Morin and Liller to stop using Hayes and that he had, at least, at this point succumbed. Thus, looking at the diary entry, it is my opinion that it shows that on May 23, 1994, Morin called Liller and told him that the Union had accepted the Company's proposal regarding the starting times and that as per the previous requests of Liller and Morin, Wayne Zakofsky was not using Hayes anymore.

According to Liller, the first time he heard the name of Hayes was on May 24, 1994, when Ron Morin called him and told him that Hayes had had an accident and that it had not been

[3] David Taber, who was a dispatcher in Rochester when these events occurred, testified that the Company was continually looking for casuals who were needed to fill in for drivers who were out for sickness, vacations, days off, etc. He testified that the Company had a hard time finding people who were qualified. With respect to Hayes, he testified that he felt that Hayes was a marginal employee. Taber also testified that he could not understand why Zakofsky would protect Hayes and that it seemed crazy to him.

[4] According to Liller, because no telephone number is listed on this entry, this means that the call originated from Morin.

reported. According to Liller, after receiving this phone call from Morin, he called Zakofsky and told him not to use Hayes anymore. This is confirmed in his diary entry at item 4 for May 24, which states: "(c) Talk with Wayne—Hayes accident?" The point here is that Liller's claim that he first heard of Hayes on May 24 is contradicted by his diary entry of May 23, if the earlier entry is construed as meaning that Wayne Zakofsky had agreed not to use Hayes as previously asked. (I recognize that Hayes' name does not appear on the May 23 entry.)

Between May 24 and early June, Zakofsky changed his mind and used Hayes again as a casual driver. He testified that on June 6, Liller called and asked why he was using Hayes again and said that Hayes had only 4 days left before becoming a preferred casual. According to Zakofsky, Liller told him to get rid of Hayes. Later that day, Zakofsky sent an e-mail letter to Liller stating that he would not discharge Hayes whom he believed was being blackballed by the Union.

On June 7, Liller called Zakofsky and told him that he had to get rid of Hayes and that he had 30 seconds to make up his mind. Zakofsky agreed to discharge Hayes and he did so on June 8, 1995.

On June 8, Liller phoned Zakofsky and asked why the Hayes accident had not been entered into the computer. Zakofsky replied that it was a minor accident involving minimal damage and cost. On the following day, Zakofsky sent an e-mail message to Liller setting forth his reasons for not reporting the accident. He also said that he did not think it was fair that a change in work rules was obtained by trading for a man's job.

On or about June 12, the Company's president, Fred Ratner, called Zakofsky about the Hayes accident. When Zakofsky tried to bring up the blackball claim, Ratner said he knew nothing about that and hung up.

On June 21, 1995, Liller told Zakofsky that he was fired for failing to report Hayes' accident.

With respect to Hayes, the Company asserts that the only reason it discharged him was because it has a strict policy to not employ any casual driver who has a preventable accident.

Notwithstanding this assertion, such a policy has never been written down and Zakofsky testified that although he was aware that casual drivers should not ordinarily be retained if they have preventable accidents, he understood that as terminal manager he had some discretion in enforcing this policy which he did in the case of Hayes.

I have no doubt that the general policy of the Company was not to retain casual employees who get into preventable accidents. The two questions here are: (a) whether that policy has been uniformly applied *without exception* and regardless of circumstance and/or (b) whether that policy was actually applied in the case of Hayes.

The Company put into evidence records showing the discharges of some casual employees who had gotten into preventable accidents. Nevertheless, these records do not show the obverse; to wit whether *every* casual driver having a preventable accident was invariably discharged. For another thing, the evidence indicates that this type of situation has not arisen at the Buffalo or Rochester terminals for at least 10 years. At the Binghamton, New York terminal, the last such incident occurred at least 8 years ago when a casual driver was discharged after he jack knifed a tractor-trailer on the highway.

Moreover, given the sequence of events, it clear to me that the decision to discharge Hayes was made by Morin and Liller before May 23, 1995; this being a time before they discovered that Hayes had the accident. Thus, as it is my opinion that the evidence shows that the reason for that decision was to accommodate the Union's demands for his discharge, the subsequent discovery of the minor accident was, to my mind, a pretext used to justify the earlier decision.

In view of the foregoing, and consistent with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I conclude that the Company violated Section 8(a)(3) by acceding to the demand of the Union to have Hayes discharged because of his internal union activity. And in this regard, it seems to me that there is more than sufficient circumstantial evidence to establish that the Union did, in fact, demand, Hayes' discharge.

While I conclude that the Union did in fact demand the discharge of Hayes as the quid pro quo of reaching an agreement on modifying the start time arrangements, the Union argues that it cannot be found to have violated the Act because there is no evidence that it engaged in any conduct within the Act's 10(b) statute of limitations period. The charge in Case 3–CB–6734 was filed by Hayes on January 17, 1995, but this alleged conduct by the Union while he was employed by RMA/Kolko Corporation, and did not allege any attempt to cause Red Star to discharge Hayes. The charge in Case 3–CB–6894 was filed by Hayes on November 20, 1995, and, therefore, the 10(b) period commenced on May 20, 1995.

A defense based on Section 10(b) is construed by the Board as an affirmative defense which must be plead in the answer or at the hearing. As this was not raised until the briefs were filed, this defense can have no merit. *Public Service Co.*, 312 NLRB 459 (1993). Moreover, as the discharge of Hayes took place on June 8, 1995, well within the 10(b) period, the Union's causation of his discharge also took place within the 10(b) period even if its demands for his discharge were made earlier. I, therefore, conclude that the Union by its efficacious demand for the discharge of Hayes violated Section 8(b)(1)(A) and (2) of the Act. *San Jose Stereotypers (Dow Jones & Co.)*, 175 NLRB 1066 fn. 3. (1969).[5]

With respect to Zakofsky, the Company asserts that he was discharged because he failed to follow company policy by failing to report the Hayes accident. While it is true that Zakofsky did not report the accident, the reason he refused to do so was because he reasonably believed, based on his previous conversations with Morin, that had he done so, this would have given the Company a pretext to discharge Hayes as demanded by the Union.

The Board in *Parker Robb Chevrolet*, 262 NLRB 402, 402–404 (1982), set out the parameters of those circumstances under which the discharge of a supervisor will violate the Act. It stated:

> Notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in certain circumstances, none

[5] In *San Jose Stereotypers*, the Board stated:

> The Trial Examiner held that "if Respondent's objections [to Anderson's transfer] had amounted to no more than a simple request, this might not have satisfied the term 'cause or attempt to cause' as used in the Act. We do not agree. In accordance with our previous holdings, we hold in this case that a union's efficacious request that an employer discriminate against an employee is unlawful. . . . We do not find it necessary, therefore, to determine whether the Respondent's request was fortified by a threat.''

> of which are present here. Thus, an employer may not discharge a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding or during the processing of an employee's grievance under the collective-bargaining agreement. Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices, or because the supervisor fails to prevent unionization. In all these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their Section 7 rights.
>
> . . . .
>
> In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest of when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

In *Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989), the court held that the employer illegally violated the Act by discharging a supervisor who refused to falsify employee termination slips in an attempt to establish a pretextual reason for the discharges. The court, after reviewing a number of other decisions, stated:

> In the instant case, Kelly was discharged because he refused to falsify termination slips showing pretextual reasons for employee discharges which, if made, would have tended to thwart the discharged employees' efforts to obtain redress under the Act.

In *Howard Johnson v. NLRB*, 702 F.2d 1, 4 (1st Cir. 1983), the court upheld the Board's finding that the employer violated the Act by discharging a supervisor who refused to engage in spying on union activities. Similarly, in *Gerry's Cash Market Inc. v. NLRB*, 602 F.2d 1021 (1st Cir. 1979), the court agreed with the Board's conclusion that the employer violated the Act by demoting a supervisor because he refused to enforce an overly broad no-solicitation rule.

In the present case, Zakofsky had been the Rochester terminal manager for 11 years. Liller described Zakofsky as being an inordinately loyal employee, in part because Liller had helped him out when Zakofsky was ill. There is no evidence that Zakofsky did not perform his job well and the fact is that without his initiative, the modification of the contract's restrictions on starting times would never have occurred. Whether Zakofsky was an exemplary employee is not known by me. But there is nothing to indicate that his performance of his job was anything other than competent.

Given his past history with the Company, his loyalty and initiative, I simply cannot accept that the real reason that he was discharged was because he failed, on one occasion, to file an accident report. Moreover, as the evidence shows that Morin was demanding that Hayes be phased out, Zakofsky's refusal to file the report was motivated by his refusal to be a part of the illegal trade worked out between the Union and Morin for a start time agreement in exchange for Hayes' job. As such Zakofsky's failure to file the report was inextricably tied to his justifiable belief that it would be used unlawfully as a pretext to get rid of Hayes.

In my opinion, the facts show that Zakofsky was discharged because of his objections to the orders by his superiors to discharge Hayes and his foot dragging in carrying out such orders. As such, it is my opinion that the motivation for his discharge was unlawful under the cases cited above.

The complaint in Case 3–CB–6734 alleges that the Union violated Section 8(b)(1)(A) of the Act when, in September 1994, its junior shop steward, approached Hayes and said that Cantwell would get Hayes a steady job with benefits if he would drop out of the race for union office. I credit Hayes' version of these events but this raises a somewhat arcane legal issue.

Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the rights guaranteed by Section 7 of the Act. In this respect, it is unlike Section 8(a)(1) of the Act which prohibits an employer from engaging in conduct to "interfere with, retrain, or coerce'' employees in their Section 7 rights. The fact that Section 8(b)(1)(A) omits the word "interfere'' has generated some differences of opinion as to whether this section of the Act is a correlative to Section 8(a)(1) and prohibits the same type of conduct.

In *National Maritime Union*, 78 NLRB 971 (1948), the Board stated:

> Nothing in the legislative history indicates that a union which refused to bargain is to be considered as having per se "restrained'' or "coerced'' employees in the exercise of their rights guaranteed in Section 7. . . . Nor is there any suggestion in the legislative history of Section 8(b)(1)(A) that "coercion'' and "restraint'' may be found to flow automatically from a union's violation of Section 8(b)(2).

In *NLRB v. Drivers Local 639 (Curtis Bros.),* 362 U.S. 274 (1960), the Supreme Court construed Section 8(b)(1)(A) narrowly and stated:

> Section 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.

Nonetheless, the Supreme Court in *Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 738 (1961), stated, inter alia:

> In the Taft-Hartley Law, Congress added Section 8(b)(1)(A) to the Wagner Act, prohibiting, as the court of Appeals held, "unions from invading the rights of employees under Section 7 in a fashion comparable to the activities of employers prohibited under Section 8(a)(1).'' . . . It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.

In the context of representation election campaigns, the Board has uniformly held that employer promises or grants of benefits, such as wage increases, are violative of Section 8(a)(1) of the Act when they are timed to affect an election and are not consistent with the employer's past practice. *NLRB v.*

Exchange Parts Co., 375 U.S. 405 (1963); and *Baltimore Catering Co.*, 148 NLRB 970 (l964). In such cases, the grant or promise of a benefit such as a wage increase is something that is within the employer's power to unilaterally accomplish and constitutes interference with employee rights to select a bargaining representative.

In *NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973), the Court held, in the context of a representation election case, that a waiver of union initiation fees for only those employees signing union cards before an NLRB election, was objectionable conduct as it constituted a grant of a benefit by a union designed to influence voters. The Court expressly did not decide whether it would be an unfair labor practice for a union to promise a special benefit to employees as an inducement to sign up for a union.

There are, to my knowledge, only two cases, where the Board has found that a union's grant of a benefit is violative of Section 8(b)(1)(A) of the Act. Both cases were decided after *Savair*.

It appears that the issue of whether a union's grant of a benefit consitituted an unfair labor practice was first addressed in *Flatbush Manor Care Center,* 287 NLRB 457 (1987). In that case the Union paid out a total of $2241 to 48 employees in amounts ranging from $4.80 to $114. Most of these payments were made after an election petition was filed and before the election was actually held. The Board adopted the administrative law judge's conclusion that such payments were designed to influence the outcome of the NLRB election and it concluded that they therefore tended to "restrain and coerce employees'' to vote against one of the two competing unions. In reaching this conclusion, the judge rejected the Union's argument that a grant of benefit, at most, constituted "interference'' and did not rise to the level of "restraint or coercion.'' He quoted from the court's decision in *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981), revg. 248 NLRB 83 (1980), where the court reviewed some of the legislative history of this section of the Act and stated:

> Omission of the words "interfere with'' from Section 8(b)(1)(A) was not intended to indicate that union conduct should be measured against a less demanding standard than employer conduct. The legislation as originally proposed contained these words. They were deleted because it was feared that they would unduly restrict union organization campaigns; they might be "construed to mean that any conversation, any persuasion, any urging on the part of any person, in any effort to persuade another to join a labor organization, would constitute an unfair labor practice.'' . . . Senator Taft agreed to the deletion because he was convinced it would have no effect on the application of Section 8(b)(1)(A):
>
> I have consulted with the attorneys and they tell me that elimination of the words "interfere with'' would not, so far as they know, have any effect on the court decisions. Eliminating those words would not make any substantial change in the meaning.

Flatbush Manor, supra, was followed by *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268, 275 (1991), where the Board held that the Union violated Section 8(b)(1)(A) by refunding initiation fees to certain employees shortly before a decertification election in circumstances where the Union was aware that a number of employees were dissatisfied with the Union because they felt that the initiation fees were too high. The Board concluded that this granting of a benefit was calculated to influence the outcome of the vote.

The two cited cases dealt with actual grants of benefits designed to influence voters in elections being conducted by the National Labor Relations Board to choose whether employees wished to be represented by a labor organization. In the present case, we are dealing with a single promise by a junior shop steward to induce a candidate for union office to withdraw from an internal union election. Unlike the grants of benefits in the cited cases, which were made to many of the potential voters, the situation in the present case is more like the kind of deal making that is hardly unknown in political or union elections.

In my opinion, a finding that the Union violated Section 8(b)(1)(A) on these facts would risk putting the Board directly into the business of regulating internal union elections and the election campaigning and deal making that are attendant to them. That is a function that the Department of Labor is authorized to carry out under the Landrum-Griffin Act.

This is not a case where union representatives have engaged in physical intimidation or threats thereof; conduct which clearly would be unfair labor practices under Section 8(b)(1)(A) of the Act. Nor was this promise the type of conduct, which adversely affected Hayes' current job or existing benefits. And in this respect, I have concluded above, that when the Union's conduct did affect his job, that conduct violated the Act in the manner previously described.

Accordingly, for the reasons stated above, I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By causing or attempting to cause USF Red Star, Inc. to discharge John M. Hayes because of his union activities, Local 118, International Brotherhood of Teamsters, has violated Section 8(b)(2) of the Act.

2. By discharging John M. Hayes pursuant to the Union's request, the Company has violated Section 8(a)(1) and (3) of the Act.

3. By the aforesaid conduct, the Company and the Union have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged John Hayes and Wayne Zakofsky, the Employer must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In relation to John Hayes, the Employer shall be jointly and severally liable for backpay.

The Union, having caused the Employer to discriminate against John Hayes, it is required, jointly and severally with the Employer, to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date that the Union requests his reemployment,

less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* supra, plus interest as computed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, USF Red Star, Inc., a U.S. Freightways Company, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union activities or other concerted activity for mutual aid and protection.

(b) Discharging a supervisor because of his or her refusal to follow orders requiring him to commit an unfair labor practice.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wayne Zakofsky and John Hayes full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Wayne Zakofsky and John Hayes whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Rochester, New York, copies of the attached notice marked "Appendix A."[7] Copies of the notice, on forms provided by the Regional Director for Region 3 after being signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The Respondent, Local 118, International Brotherhood of Teamsters, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing USF Red Star, Inc., a U.S. Freightways Company, or any other employer to discriminate against employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify USF Red Star, Inc., a U.S. Freightways Company, in writing that it has no objection to the employment of John Hayes and that it requests USF Red Star, Inc., to return Hayes to the employment from which he was discharged.

(b) Make John M. Hayes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its office in Rochester, New York, copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 3 signed copies of the attached notice marked "Appendix B" for posting by the Employer, at its premises in Rochester, New York, in places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Doren Goldstone Esq., for the General Counsel.
Paul M. Sansoucy Esq. and *Subhash Viswantathan, Esq.,* for the Respondent Employer.
Michael T. Harren Esq., for the Respondent Union.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On October 21, 1996, I issued a decision in the above-captioned cases in which I found that the Respondents had violated certain sections of the Act with respect to Wayne Zakofsky and John M. Hayes. I found that the Union, as a condition of agreeing to the

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[8] See fn. 7, supra.

Company's request for a change in a contractual provision regarding start times, insisted that the company discharge and not use John M. Hayes as a driver. I also found that the employer agreed to this demand and that it instructed Terminal Manager Wayne Zakofsky not to use Hayes any longer. I concluded that the fact that Hayes got into a minor accident was used as a pretext to discharge him. And I finally concluded that the Company decided to discharge Zakofsky because he was reluctant to carry out his orders to discharge Hayes.

On May 2, 1997, the Board remanded this matter to me for the purpose of making specific credibility resolutions insofar as the conflicting testimony of Wayne Zakofsky and witnesses, Posato, Cantwell, Liller, Tabor, and Cannistra.

I note at the outset that I was impressed by the demeanor of. Zakofsky and Hayes, whose testimony, in my opinion, was consistent with the record as a whole. On the contrary, I was not impressed with the demeanor of union witnesses Posato and Cantwell whose testimony, as pointed out in my earlier decision, was contradictory. (Each claimed that the other made the final agreement regarding the start times.) Moreover, I pointed out that their assertion that the quid pro quo regarding the start time agreement was the Company's agreement to have the Rochester drivers bring their loads to Buffalo did not make much sense since this was not a concession by the Company but rather something that the Company itself was seeking to accomplish. Thus, not believing their testimony that this was the quid quo pro, I came to the conclusion, consistent with the testimony of Zakofsky, that the quid quo pro for changing the start times was that Hayes be discharged.

I also was convinced that the testimony of Liller was not accurate, and as pointed out in the earlier decision, I noted that although he testified that he had never heard of Hayes before May 24, 1994 (when Ron Morin called him to tell him of Hayes' accident), Liller's diary shows that he made an entry on May 23, 1995, which I construed as meaning that Wayne Zakowfsky was not going to use Hayes as we have asked. If my reading and understanding of Liller's diary entry is correct, this entry comes as close to being a "smoking gun" as I have personally seen in a Board case.

Dick Cannistra and Dave Taber testified that the Company had a policy of discharging any casual driver who has a preventable accident. However, they were not in a position to state that this policy, which is nowhere in writing, was uniformly carried out on a companywide basis, and without exception. Cannistra could testify about his handling of such situation in his own terminal (Buffalo), and Taber did not have any direct knowledge of the procedures that Zakofsky used while he was the Rochester manager. There is no dispute about the fact that the Company has a policy of discharging casual drivers who have preventable accident. There is also no dispute that Hayes had a preventable (albeit a minor) accident on April 28, 1995.[1] What hasn't been shown to my satisfaction, is that this is a policy that has no exceptions and about which a terminal manager, such as Zakofsky, has absolutely no discretion. Zakofsky credibly testified that he believed that he did have such discretion.

To the extent that the testimony of Zakofsky conflicted with the testimony of Respondents' witnesses, I credit Zakofsky. Specifically, I make the following findings:

1. I credit Zakofsky's testimony that in the late winter or early spring of 1995, Cantwell asked him, during the course of a grievance meeting, why he was still using that "scumbag," Jack Hayes.

2. I credit Zakofsky's testimony that in early March 1995, Morin called him and related that Cantwell said that Hayes was a troublemaker.

3. I credit Zakofsky's testimony that in early April 1995, he received a phone call from Morin who said that he had spoken to Cantwell and that the Union would make concessions but wanted Hayes fired.

4. I credit Zakofsky's testimony that at the end of the meeting with the Union on April 28, 1995, Posato said that if the company wanted negotiation on changing the start times, "you know what I want."

5. I credit Zakofsky's testimony that after the April 28 meeting Morin told him on the way back to the terminal, that Hayes was gone; that they had no choice and had to get rid of him in order to get negotiations going.

6. I credit Zakofsky's testimony that in May Morin called him and asked if he was phasing Hayes out and that he responded that he was not going to do that.

7. I credit Zakofsky's testimony that in May 1995 Liller told him that because of the negotiations, he had to let Hayes go. I also credit his testimony that he told Liller that he thought this was illegal and didn't like it.

8. I credit Zakofsky's testimony that on June 6 Liller called him and asked why he was using Hayes again; that there were only 4 days left before Hayes became a preferred casual; and that Zakofsky should get rid of him. I further credit Zakofsky's testimony that he objected to this instruction.

9. I credit Zakofsky's testimony that he sent an e-mail to Liller saying that he would not let Hayes go and that on June 7 Liller told him that he had read the e-mail message and gave Zakofsky 30 seconds to make a decision to get rid of Hayes, "or else."

10. I credit Zakofsky's testimony that on one or more occasions, he had conversations with Dick Cannistra, about the difficulty of finding enough good casual drivers and that if a casual driver had a minor accident, they would overlook it.

In accordance with *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I reaffirm my previous findings and conclusions that the Respondent has not met its burden of showing that it would have taken the same actions against Hayes and Zakofsky, notwithstanding their protected and concerted activities;

Accordingly, I reaffirm my earlier decision that the Union violated the Act by causing or attempting to cause USF Red Star, Inc., to discharge John M. Hayes because of his union activities, Local 118, International Brotherhood of Teamsters, has violated Section 8(b)(2) and (A) of the Act.

I also reaffirm my earlier decision that the Employer has violated Section 8(a)(1) and (3) of the Act by discharging John M. Hayes pursuant to the Union's request, and that the Employer has violated Section 8(a)(1) of the Act by discharged Wayne Zakofsky.

[1] Finally, there is no dispute that Zakofsky failed to file the accident report regarding the Hayes accident. It is clear to me that Zakofsky knew that his failure to file the accident report was wrong and he acted this way because he believed that this would lead to Hayes' discharge as part of the deal between the Company and the Union.